

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
 2 A Limited Liability Partnership  
 3 Including Professional Corporations  
 CHARLES S. DONOVAN, Cal. Bar No. 103667  
 cdonovan@sheppardmullin.com  
 FINLEY TAYLOR, Cal. Bar No. 48774  
 ftaylor@sheppardmullin.com  
 BRIAN R. BLACKMAN, Cal. Bar No. 196996  
 bblackman@sheppardmullin.com  
 Four Embarcadero Center, 17th Floor  
 San Francisco, California 94111-4109  
 Telephone: 415-434-9100  
 Facsimile: 415-434-3947  
 8 Attorneys for SHEPPARD MULLIN RICHTER &  
 HAMPTON, LLP  
 9

10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

FILED  
 09 SEP 16 PM 3:04  
 RICHARD W. HANLON  
 CLERK, U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

E-filing

CRB

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 12  
 13 SHEPPARD MULLIN RICHTER &  
 HAMPTON, LLP,  
 14 Petitioner,  
 15  
 16 v.  
 17 COMERCIALIZADORA DE CALIDAD,  
 S.A.,  
 18 Respondent.  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

CV 09

Case No.

4309

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 PETITION TO CONFIRM  
 ARBITRATION AWARD AND EX PARTE  
 APPLICATION FOR WRIT OF  
 ATTACHMENT**

**PUBLIC – REDACTED VERSION**

## INTRODUCTION

2 This is an action to confirm a final international arbitration award under 9 U.S.C. § 301, et  
3 seq. Petitioner, Sheppard Mullin Richter & Hampton, LLP ("Sheppard Mullin" or "Petitioner"),  
4 has identified two customers and a payment agent of Respondent, Comercializadora de Calidad  
5 (known in English as "Quality Print" and referred to as such or "Respondent"), located within  
6 California and believes these customers and agent hold accounts receivable and other debts  
7 belonging to Respondent. Petitioner brings this action to enforce its award by attachment of and  
8 eventually levy upon those accounts and any other corporate property of Respondent located in  
9 this State.

## I. FACTS

11 Sheppard Mullin is a California limited liability partnership.. (Declaration of Charles  
12 Donovan ("Donovan Decl.") ¶ 1.) Quality Print is a Guatemala company.

## 13 | A. The Cargo Insurer Claim

14 In September 2006, Quality Print engaged Sheppard Mullin to assist with a claim against  
15 its cargo insurer in connection with a dispute over damage to a printing press caused during  
16 shipment from the United States to Guatemala. (Donovan Dec. ¶ 2.) Sheppard Mullin entered  
17 into a written engagement agreement (the "Agreement") with Quality Print dated September 28,  
18 2006 to assist Quality Print with the cargo insurer claim. (Ex. A to Donovan Dec.) The  
19 Agreement provided for arbitration of fee disputes between the parties in accordance with the  
20 International Arbitration Rules of the International Centre for Dispute Resolution. (Ex. A ¶ 7 to  
21 Donovan Dec.)

22 Sheppard Mullin negotiated a settlement with the cargo insurer that included a waiver of  
23 subrogation, giving Quality Print the right to pursue directly Maersk Sealand for damage to the  
24 cargo. (Donovan Dec. ¶ 3.) Quality Print fully paid Sheppard Mullin's fees in connection with the  
25 insurance dispute. (Id.)

## 26 | B. The Maersk Sealand Litigation

27 In October 2005, Quality Print filed suit against Maersk Sealand in Panama. (Donovan  
28 Dec. ¶ 4.) Sheppard Mullin was not involved in the dispute with Maersk Sealand at this point.

1 (Id.) After filing suit, Quality Print threatened to seize a Maersk Sealand ship as it transited the  
 2 Panama Canal. (Id.) To avoid seizure, Maersk Sealand posted a \$10 million cash bond with the  
 3 Panamanian court. (Id.) On April 10, 2006, Maersk Sealand filed suit in federal court in New  
 4 York against Quality Print and others involved in the lost shipment. (Id.)

5 Maersk Sealand claimed, among other things, that Quality Print had no right to pursue the  
 6 Panamanian action because of a forum selection clause in the Maersk Sealand bill of lading.  
 7 (Donovan Dec. ¶ 4.) Maersk Sealand obtained a writ of attachment against Quality Print under  
 8 Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal  
 9 Rules of Civil Procedure. (Id.) Under the Second Circuit's decision in Winter Storm Shipping v.  
 10 TPI, 310 F.3d 263 (2d Cir. 2002), cert. denied, 539 U.S. 927 (2003), a Rule B writ reaches  
 11 electronic funds transfers (EFT's) in the hands of intermediary banks. With the writ, Maersk  
 12 Sealand was able to intercept several hundred thousand dollars of Quality Print's money that was  
 13 moving by EFT through New York-based intermediary banks. (Id.)

14 While Sheppard Mullin was representing Quality Print with its dispute with its cargo  
 15 insurer, Quality Print requested Sheppard Mullin's assistance with the Maersk Sealand case  
 16 pending in New York. (Donovan Dec. ¶ 6.) [REDACTED]

17 [REDACTED]  
 18 [REDACTED] (Id.) [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED] (Ex. C to  
 21 Donovan Dec.) [REDACTED] (Donovan Dec. ¶ 6.) The  
 22 advance was paid on or about June 18, 2007. (Id.) Sheppard Mullin appeared in the New York-  
 23 based Maersk Sealand action on July 6, 2007. (Id.)

24 Throughout Sheppard Mullin's handling of the Maersk Sealand action, Sheppard Mullin  
 25 sent monthly bills to Quality Print. (Donovan Dec. ¶ 8.) [REDACTED]

26 [REDACTED] (Id.) [REDACTED]  
 27 [REDACTED] (Id.) [REDACTED]  
 28 [REDACTED]

1 [REDACTED]  
 2 [REDACTED] (Id.) Despite these assurances, payment never materialized.  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED] (Ex. E to Donovan Dec. [REDACTED])

6 [REDACTED]  
 7 [REDACTED] (Id.) Mr. Fernandez did not respond. (Donovan Dec. ¶ 9.) The Court granted  
 8 Sheppard Mullin's motion to withdraw by order entered on June 13, 2008. (Id.)

9 **C. Sheppard Mullin Obtains Arbitration Award.**

10 On November 7, 2008, Sheppard Mullin filed a Notice of Arbitration with the International  
 11 Center for Dispute Resolution ("ICDR") for recovery of the outstanding fees and disbursements.  
 12 (Donovan Dec. ¶ 10.) Prior to filing the arbitration proceeding, Sheppard Mullin notified Quality  
 13 Print of its alternative right under Sections 6200-6206 of the California Business and Professions  
 14 Code to have the fee dispute arbitrated under a program administered by the Los Angeles County  
 15 Bar Association. (Id.) Quality Print did not respond. (Id.) Sheppard Mullin duly served Quality  
 16 Print with notice of the arbitration proceeding before the ICDR. (Id.)

17 Quality Print did not respond to Sheppard Mullin's arbitration demand. (Donovan Dec.  
 18 ¶ 11.) The ICDR advised Quality Print on several occasions that its failure to appear would not  
 19 stop the arbitration from proceeding nor prevent an award. (Id.) An Arbitration hearing convened  
 20 on May 20, 2009. (Id.) Sheppard Mullin appeared; Quality Print did not. (Id.) The Arbitrator  
 21 took evidence by way of written submissions and deemed the record closed on May 21, 2009.  
 22 (Id.)

23 The Arbitrator issued an arbitration award dated June 9, 2009, in favor of Sheppard Mullin  
 24 (the "Award"). (Ex. F to Donovan Dec.) The Award finds Quality Print liable to Sheppard Mullin  
 25 in the amount of US\$196,877.95. (Id.) Quality Print's payment to Sheppard Mullin under the  
 26 Award was due thirty (30) days from the date it received the Award. (Id.) No part of the Award  
 27 has been paid. (Donovan Dec. ¶ 12.)

28

1 The Award was issued in Los Angeles, California. (Donovan Dec. ¶ 12.) Under United  
2 Stated law, the Award is final and binding upon Sheppard Mullin and Quality Print, and has not  
3 been set aside, modified or appealed. (Id.)

## II. LEGAL ANALYSIS

## 5 A. The Court Should Confirm The Award Under The Inter-American Convention.

6 The United States and Guatemala are members of the Organization of American States and  
7 signatories to the Inter-American Convention on International Commercial Arbitration, January  
8 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975), implementing statutes codified at 9 U.S.C.  
9 §§ 301-307. The Inter-American Convention governs enforcement and confirmation of the  
10 Award. 9 U.S.C. §§ 301 & 305; See Productos Merchantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 44 (2d Cir. 1994) (Inter-American Convention gives court jurisdiction to confirm  
11 awards rendered in United States); see also Progressive Cas. Ins. Co. v. C.A. Reaseguradora  
12 Nacional de Venezuela, 802 F. Supp. 1069, 1073-74 (S.D.N.Y. 1992) (Inter-American Convention  
13 governs between citizens of signatory States when those states are also member States of the  
14 Organization of American States).

16 The Inter-American Convention incorporates the enforcement and recognition provisions  
17 of the Convention on Recognition and Enforcement of Foreign Arbitral Award, implementing  
18 statutes codified at 9 U.S.C. §§ 201-309 (the "New York Convention"). 9 U.S.C. § 302. The New  
19 York Convention strictly limits the District Court's authority in reviewing an arbitral award: "the  
20 court shall confirm the award unless it finds one of the grounds for refusal or deferral of  
21 recognition and enforcement of the award specific in the said Convention." 9 U.S.C. § 207; Banco  
22 de Seguros del Estado v. Mutual Marine Offices, Inc., 257 F. Supp. 2d 681, 685 (S.D.N.Y. 2003).

23 The New York Convention, and by incorporation the Inter-American Convention, provides  
24 seven grounds under which an arbitral award may not be confirmed:

25 1. a party to the arbitration agreement lacked capacity or the agreement is  
otherwise invalid;

26 2. a party against whom the award is invoked had insufficient notice of the  
arbitration proceeding;

27 3. the dispute is beyond the scope of the arbitration agreement;

- 1        4. the composition of the arbitral authority or the arbitration proceeding were  
2        not in accordance with the arbitration agreement or with the law of the  
country where the arbitration took place;
- 3        5. the award is not yet final or binding on the parties;
- 4        6. the dispute is not capable of settlement by arbitration under the laws of the  
country where confirmation of the award is sought; and
- 5        7. confirmation of the award would violate the public policy of the country  
6        where confirmation of the award is sought.

7        See 9 U.S.C. §§ 207 and 301; Banco de Seguros del Estado, 257 F. Supp. 2d at 686, fn.4. These  
8        are the only grounds available for setting aside an award. Id. Moreover, the New York  
9        Convention clearly manifests a "general pro-enforcement bias." Parsons & Whittemore Overseas  
10      Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir.  
11      1974).

12        Quality Print has not raised any of these grounds for challenging confirmation of the  
13        Award under the Inter-American Convention. See 9 U.S.C. § 301, note; Banco de Seguros del  
14      Estado, 257 F. Supp. 2d at 686, fn.4. Accordingly, the Court should grant Sheppard Mullin's  
15      Petition and confirm the Award.

16      **B. The Court Should Issue A Writ of Attachment.**

17        Under Rule 64 of the Federal Rules of Civil Procedure, this Court may use the  
18        prejudgment attachment procedures available under California law. "[P]ursuant to Rule 64 of the  
19        Federal Rules of Civil Procedure the district courts employ the procedures and remedies of the  
20        states where they sit." Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1052 (N.D. Cal.  
21        1977) (upholding writ of attachment on claims covered by arbitration agreement). The fact that  
22        the instant case involves an arbitral award does not affect Sheppard Mullin's right to attachment.  
23        "[A]ttachment and comparable provisional remedies for enforcement of a foreign arbitral award, if  
24        available in the enforcing state, are compatible with the Convention." Glencore Grain Rotterdam  
25      B.V. v. Shivnath Rai Harnarian Co., 284 F.3d 1114, 1127 (9th Cir. 2002), quoting, Restatement  
26      (Third) of Foreign Relations Law § 487 reporter's note 7 (1987).

27        Sheppard Mullin has located several customers and a payment agent for Quality Print ,  
28        who are subject to the Court's jurisdiction. These third parties possess accounts receivables or

1 other debts payable to Quality Print. The presence of that property gives the Court the power to  
 2 act to enforce Sheppard Mullin's arbitral award. The holder of an arbitral award "can enforce the  
 3 award against [respondent's] property in the forum even if that property has no relationship to the  
 4 underlying controversy between the parties." Glencore, 284 F.3d at 1127; citing, Shaffer v.  
 5 Heitner, 433 U.S. 186, 53 L.Ed. 2d 683, 97 S. Ct. 2569 (1977).

6 The California Code of Civil Procedure authorizes the issuance of an attachment against  
 7 resident and nonresident defendants on claims for money over \$500.00 that are based on written or  
 8 oral contracts. Cal. Code Civ. Proc. §§ 483.010 and 492.010. Sheppard Mullin submits the state  
 9 Judicial Council forms in support of the requested state law attachment.

10 California Code of Civil Procedure § 484.020 provides for an attachment under the present  
 11 circumstances. The Declaration of Charles Donovan establishes this action arises from a contract  
 12 and is a claim for money that exceeds \$500.00.

13 Code of Civil Procedure § 484.020, subds. (c) and (d), require a statement that the  
 14 attachment is not sought for improper purposes, and that the applicant has no information or belief  
 15 that the claim was discharged in a proceeding or that prosecution of the claim is stayed in a  
 16 proceeding under Title 11 of the United States Code (Bankruptcy). These statements are  
 17 contained in the Application for Right to Attach Order under paragraph 4 and 5.

18 Sheppard Mullin states the amount to be secured by attachment in both the moving papers  
 19 and the Petition. Sheppard Mullin's application states the attachment is not sought for improper  
 20 purposes and that Sheppard Mullin has no information or belief that the claim was discharged in a  
 21 proceeding or that prosecution of the claim is stayed in Bankruptcy.

22 In the case of a corporate nonresident defendant, the Code of Civil Procedure (§§ 487.010  
 23 and 492.040) explicitly authorizes attachment of all corporate property for which a method of levy  
 24 is provided. Here, Sheppard Mullin seeks to attach accounts receivable and other debts owed to  
 25 Quality Print by debtors subject to the Court's personal jurisdiction. (Donovan Dec. ¶ 5; Ex B.)  
 26 These accounts receivable and debts are corporate property subject to attachment pursuant to  
 27 California Code of Civil Procedure § 487.010(a). California Code of Civil Procedure § 488.470  
 28 sets forth the method for levying upon these types of property.

1 **C. State And Federal Law Authorize Ex Parte Issuance Of A Writ Of Attachment.**

2 Civil Local Rule 7-10 allows a party to proceed ex parte "only if a statute, Federal Rule,  
 3 local rule or Standing Order authorizes the filing of an ex parte motion in the circumstances..."  
 4 Rule 64 of the Federal Rules of Civil Procedure authorizes use of state law attachment procedures.  
 5 California Code of Civil Procedure §§ 492.010, et seq., contain a special ex parte procedure for  
 6 obtaining writs of attachment against nonresidents. See Textainer Equipment Management B.V.  
 7 v. The Freights of the M/S GULF TRADER, 1993 A.M.C. 99, 100 (N.D. Cal. 1992). Section  
 8 492.010(b) permits an attachment to issue on an ex parte basis in an action for the recovery of  
 9 money brought against a foreign corporation not qualified to do business in California.

10 Quality Print is not qualified to do business in California. (Donovan Dec. ¶ 2.) The Court  
 11 may therefore issue an attachment on an ex parte basis pursuant to Cal. Code Civ. Proc.  
 12 § 492.010(b).

13 Sheppard Mullin is also authorized to make this application by ex parte hearing pursuant to  
 14 Cal. Code Civ. Proc. § 485.010 as it will suffer great and irreparable injury. Pursuant to Cal. Code  
 15 of Civ. Proc. § 485.010, subd. (b)(1), it can be inferred from the facts that Quality Print's property  
 16 is mobile, i.e., it can be easily moved, concealed or spent, and that it may attempt to remove this  
 17 property from this District in order to preserve its assets. Indeed, Quality Print began paying its  
 18 debts in the United States through a related company, Pacific Printing, to avoid the attachment  
 19 order Maersk Sealand obtained from the United States District Court, Southern District of New  
 20 York. (Ex. D to Donovan Dec.; Donovan Dec. ¶ 7.) There is nothing to stop Quality Print from  
 21 doing the same thing under the present circumstances through another undisclosed company or  
 22 agent.

23 Sheppard Mullin faces a grave danger that, by the time judgment on its arbitral award is  
 24 entered in the instant action, Quality Print's property will no longer be in the district. By then,  
 25 enforcement of a judgment or arbitral award may be difficult, if not impossible. To obtain an ex  
 26 parte writ of attachment, the moving party must show:

27 [T]hat great or irreparable injury would result to the plaintiff if  
 28 issuance of the order were delayed until the matter could be heard  
 on notice.

1                   The requirement of subdivision (a) is satisfied if any of the  
 2 following are shown: (1) Under the circumstances of the case it  
 3 may be inferred that there is a danger that the property sought to be  
 4 attached would be concealed, substantially impaired in value, or  
 5 otherwise made unavailable to levy if issuance of the order were  
 6 delayed until the matter could be heard on notice.

7                   Cal. Code Civ. Proc. § 485.010(a),(b). Here, the property sought to be attached is accounts  
 8 receivable and other debts which may be readily transferred, forgiven or released.

9                   **D. Attachment Amount**

10                  The arbitrator awarded Sheppard Mullin \$196,877.95, in principal and costs, and required  
 11 Quality Print to pay within thirty (30) days, i.e., by July 9, 2009. (Ex. F to Donovan Dec.)  
 12 Quality Print has not paid. The award provides for "simple interest from the date of this Award  
 13 until paid in full at the rate of 10% per annum (the rate specifies in Section 2 of the Fee Agreement  
 14 as applicable to overdue accounts)." (Id.) As this matter could, if Quality Print challenges  
 15 confirmation, consume several months, Sheppard Mullin requests an attachment amount of  
 16 \$207,933.60 to cover amounts presently due plus further interest and costs that may accrue on the  
 17 award. Sheppard Mullin computes this amount as follows:

18                  \$193,727.95	Principal amount of award
19                  \$ 3,150.00	<u>Costs awarded</u>
20                  \$196,877.95	Principal amount due
21                  \$ 5,285.14	Interest @ \$53.93 per day through September 15, 2009
22                  \$ 5,770.51	<u>Interest @ \$53.93 per day through December 31, 2009</u>
23                  \$207,933.60	Attachment Amount

24                   **III. CONCLUSION**

25                  The Court should issue an attachment to secure the award in Sheppard Mullin's favor and,  
 26 after due proceedings, confirm the award.

27  
 28

1 Dated: September 15, 2009

2 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

3 By



CHARLES DONOVAN  
BRIAN R. BLACKMAN

6 Attorneys for SHEPPARD MULLIN RICHTER &  
HAMPTON, LLP

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28